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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,
Petitioner,

v.

ROBERT MAHONY, as father and personal representative of Eve Mahony, in his own behalf and as next of kin and for the use and benefit of BARBARA MAHONY,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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December 11, 1992

QUESTION PRESENTED

Whether Section 205 of the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. 434, precludes the imposition of a state law duty on railroads to evaluate the need for, select, and install, traffic-control devices at grade crossings when (1) federal regulations specify that public authorities, not railroads, have this responsibility, and (2) the FRSA expressly pre-empts state regulation of any subject matter covered by federal rail safety regulations.

LIST OF PARTIES

Parties

CSX Transportation, Inc.

Robert Mahony

Barbara Mahony

Parent Corporations

CSX Corporation

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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC.,

Petitioner,

v.

ROBERT MAHONY, as father and personal representative of Eve Mahony, in his own behalf and as next of kin and for the use and benefit of BARBARA MAHONY,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner CSX Transportation, Inc. ("CSXT") respectfully prays that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Eleventh Circuit, entered in the above-entitled proceeding on July 20, 1992, reversing the grant of partial summary judgment in favor of Petitioner by the United States District Court for the Northern District of Georgia.

OPINIONS BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 966 F.2d 644, and reprinted in the Appendix hereto at la-6a, *infra*. The Eleventh Circuit's order denying a rehearing is reprinted in the Appendix hereto at 7a. The unreported orders of the United States District Court for the Northern District of Georgia, dated February 6, 1990, and April 16, 1990, are reprinted in the Appendix hereto at 8a-20a, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on July 20, 1992. Rehearing was denied on September 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The United States Constitution provides in Article VI, Clause 2:

> This Constitution, and the Laws of the United States ... shall be the supreme Law of the Land;

Section 101 of the Federal Railroad Safety Act, 45 U.S.C. § 421, provides:

> The Congress declares that the purpose of this chapter is to promote safety in all areas of railroad operations and to reduce railroad-related accidents....

Section 202 of the Federal Railroad Safety Act, 45 U.S.C. § 431, provides:

> The Secretary of Transportation ... shall prescribe, as necessary, appropriate rules, regulations, orders, and standards for all areas of railroad safety....

Section 204(b) of the Federal Railroad Safety Act, 45 U.S.C. 433(b), provides:

> In addition the Secretary shall, insofar as practicable, under the authority provided by this subchapter and pursuant to his authority over highway, traffic, and motor vehicle safety, and highway construction, undertake a coordinated effort toward the objective of developing and

> implementing solutions to the grade crossing problem. . . .

Section 205 of the Federal Railroad Safety Act, 45 U.S.C. § 434, provides:

> The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. . . .

STATEMENT OF THE CASE

A. *Statement of Facts.*

The issue presented in this Petition arises from a fatal grade crossing accident which occurred when Respondents' adult daughter, Eve Mahony, walked in front of a CSXT train at 9:10 a.m. on January 23, 1987, as she traversed a rural crossing on a lightly traveled county road near the Wildwood Sanitarium, a private institution in rural Georgia. (Tr. Vol. II at 96; Tr. Vol. VI at 22-24, 165). The road that led to the crossing was used almost exclusively by Wildwood personnel. (Tr. Vol. IV at 46-47). Wildwood officials also maintained the road and routinely closed a gate across it at night. (*Id.*).

Although the crossing, consisting of two sets of tracks, was marked by a crossbuck warning sign, the Georgia Department of Transportation ("GDOT") had determined that the physical characteristics and volume of usage at the crossing did not justify the placement of automatic lights or gate-arms. The GDOT conducted an engineering inspection of the crossing in 1985 and determined pursuant to the federal hazardous index and regulations set forth in 23 C.F.R. Parts 646, 655, 924, and 1204.4, that the crossing did not qualify for the installation of automatic warning

devices in light of its extremely low usage and other characteristics. (April 18, 1985 GDOT Inspection Report; First Hester Affid. at ¶ 6; Hester Reply Affid. at ¶ 5).[1]

Ms. Mahony had walked over the crossing earlier on the morning of the accident while taking her regular morning walk, and was returning over the crossing when struck. The crew testified that the train, including four 3000 horsepower engines and 74 cars, was traveling 35 miles per hour, with its whistle blowing, its bell ringing, and its headlight burning. (Tr. Vol. V at 33-36, 39).

An eye-witness acquaintance of Ms. Mahony was walking toward the crossing from the opposite direction of Ms. Mahony at the time of the accident. Though he yelled to her and waved his arms as she approached the tracks, the witness testified that Ms. Mahony neither stopped, slowed, nor looked in any direction other than the ground as she proceeded across the tracks: she passed the crossbuck, proceeded with her head down, walked over the first set of tracks, and never looked up or to either side as she walked into the train's path on the second set of tracks. (Tr. Vol. IV at 38, 52-56).

B. ***Procedural History.***

Invoking diversity of citizenship jurisdiction under 28 U.S.C. § 1332, Respondents filed a wrongful death action against Petitioner alleging, insofar as is pertinent to this Petition, negligence in CSXT's failure to install "gates, gongs or other safety devices" such as crossing bells or a pedestrian overpass at the crossing in addition to the crossbuck warning sign. (Complaint at ¶¶ VI-VII).

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[1] As explained in the text *infra* at 6, Mr. Wendell Hester, Director of the GDOT's Grade Crossing Section, submitted three affidavits that were considered by the District Court. The "First Hester Affidavit" was submitted in support of CSXT's Motion for Partial Summary Judgment. Respondents also submitted a counter-affidavit by Mr. Hester in response, and CSXT submitted a third affidavit by Mr. Hester referenced as "Reply Hester Affidavit." As explained in the text *infra*, the "Reply Hester Affidavit" eliminated any confusion as to whether the GDOT had reached a decision not to install automatic warning devices at the Wildwood Crossing.

CSXT timely moved for summary judgment only with regard to Respondents' claims that CSXT was under a state law duty to (1) install additional traffic-control devices at the crossing, and (2) operate the train at a speed less than the speed set by federal regulations for the location in question.

On February 6, 1990, prior to the trial on Respondents' numerous other negligence claims,[2] the District Court initially denied CSXT's Motion for Summary Judgment on Respondents' claim that CSXT had a duty to install additional traffic-control devices or a pedestrian overpass at the crossing. The District Court interpreted Section 205 of the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 434 (hereinafter "Section 434"), to pre-empt any state statute or common law claim that relates to a subject or regulatory area addressed by federal railroad safety regulations issued through the Secretary of Transportation (hereinafter the "Secretary"). (February 6, 1990 Order at 9a-12a). The District Court held that Section 434 would pre-empt Respondents' attempt to impose a state law duty on CSXT to install additional warning devices at a crossing since federal regulations place the responsibility for selecting appropriate traffic-control

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[2] Although such claims are not directly relevant to this Petition, CSXT notes that Respondents also alleged that CSXT negligently failed to maintain adequate "sight lines" at the crossing and negligently failed to control vegetation along the approach to the crossing. Respondents further claimed that CSXT's train crew negligently operated the train by failing to (1) maintain a proper lookout, (2) sound the train's whistle, (3) react appropriately to Ms. Mahony's presence near the crossing, and (4) apply the emergency brakes sooner. (Complaint at ¶¶ V-VII) (*See generally* Respondents' Eleventh Circuit Appellant's Brief at 6-8). Finally, Respondents alleged that although it is undisputed that the train proceeded at only 35 miles per hour — well within the speed set by federal train speed regulations applicable to the section of track in question — the train was operated at an excessive and negligent speed. With the exception of the claims for excessive train speed and additional warning devices, which the trial court eventually eliminated through the grant of partial summary judgment to CSXT, a jury heard testimony on all of Respondents' other claims and returned a verdict in favor of CSXT after more than a week of trial.

devices at crossings squarely on state and local authorities with jurisdiction over the roadway in question. (*Id.*).

Nevertheless, the District Court held that under the Ninth Circuit's interpretation in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983), FRSA Section 434 would not pre-empt CSXT's alleged state law duty to install additional warning devices at the Wildwood crossing unless state and local authorities had evaluated the crossing and reached a decision with regard to the appropriate type of traffic-control devices. (*Id.* at 12a). The Court determined that there was a genuine factual dispute in the record as to whether the Georgia Department of Transportation ("GDOT"), the authority with responsibility pursuant to federal grade crossing regulations to select appropriate traffic-control devices at the crossing, had decided that the crossing did not warrant additional warning devices in light of the extremely low usage of the crossing and other factors specified in federal regulations. (*Id.* at 11a-12a).

The District Court was initially concerned that the GDOT had made inconsistent determinations as to whether automatic warning devices should be installed at the Wildwood Crossing. (*Id.*). CSXT moved for reconsideration and demonstrated the absence of any genuine dispute that the GDOT unequivocally "recommended that the crossing not be signalized" in its Inspection Report. CSXT also demonstrated on the basis of a Reply Affidavit submitted by Mr. Wendell Hester, Director of the GDOT's Grade Crossing Section, that a reference in the Inspection Report to the position for automatic warning devices merely reflected a technical determination of the proper location to place such devices in the vicinity of the crossing *if* the GDOT ever altered its decision that "the crossing [should] not be signalized." (Reply Hester Affid. at ¶ 6; First Hester Affid. at ¶ 7).

Accordingly, the District Court held on reconsideration that (1) there was no genuine dispute that the GDOT had decided that the Wildwood crossing did not justify additional warning devices, and (2) FRSA Section 434 pre-empted Respondents' negligence claim in light of the Secretary's decision to address its precise

subject matter in federal regulations which specify that public authorities have the exclusive duty to select appropriate traffic-control devices at railroad crossings according to the federal hazard index. (April 16, 1990 Order at 19a).

Following the return of a verdict in favor of CSXT on Respondents' non-preempted negligence claims, Respondents filed a notice of appeal with the Eleventh Circuit Court of Appeals on November 7, 1990. In relevant part, Respondents appealed the District Court's grant of partial summary judgment in favor of CSXT on Respondents' claim that CSXT had a state law duty to install additional warning devices at the crossing.

On April 5, 1991, CSXT filed a Motion to Consolidate the *Mahony* appeal with *Easterwood v. CSX Transportation, Inc.*, an appeal that was then under consideration by a three-judge panel of the Eleventh Circuit involving precisely the same issue of whether FRSA Section 434 pre-empts the imposition of a state law duty on railroads to install additional traffic-control devices at crossings. Although Respondents herein did not oppose it, the Eleventh Circuit denied the Motion to Consolidate. On June 20, 1991, a three-judge panel of the Eleventh Circuit held that the above-described federal regulations in 23 C.F.R. Parts 646, 655, 924, and 1204.4 are non-pre-emptive since those regulations were, in the *Easterwood* panel's erroneous view, not issued pursuant to authority granted the Secretary by the expressly pre-emptive FRSA. *But see* 45 U.S.C. § 433(b); and 49 C.F.R. § 1.48(o).

On June 29, 1992, this Court granted CSXT's petition for certiorari to review the Eleventh Circuit's determination in *Easterwood* that the FRSA does not pre-empt the imposition of a state law duty on railroads to install traffic-control devices at crossings. *CSX Transp., Inc. v. Easterwood*, No. 91-790.[3] This Court has scheduled oral argument in *Easterwood* on January 12, 1993.

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[3] This Court also granted a cross-petition in *Easterwood* to review the holding that the FRSA pre-empts the state law in position of "common law speed limits" through "excessive train speed" claims. *See Easterwood v. CSX Transp., Inc.*, No. 91-1206.

On July 20, 1992, shortly after this Court granted certiorari in *Easterwood*, a separate panel of the Eleventh Circuit issued its opinion herein and held that it was bound by *Easterwood* to reverse the District Court's grant of partial summary judgment to CSXT on Respondents' claim that CSXT had a duty to install additional warning devices at the Wildwood Crossing. *Mahony v. CSX Transp., Inc.* 966 F.2d 644, 645-46 (11th Cir. 1992) (App. at 3a-4a). Significantly, the *Mahony* panel expressly acknowledged that the *Easterwood* case involved precisely the same issue as is presented herein, explicitly refused to consider the merits of that issue, and instead found "only that the district court's judgment in favor of CSX cannot stand in light of *Easterwood*." *Id.* at 647, App. at 3a-4a). Judge Birch, concurring specially, disagreed with the *Easterwood* panel's holdings. *Id.* Although Judge Birch suggested that *Easterwood* should be reconsidered, the Court of Appeals denied CSXT's Petition for Rehearing and Suggestion for Rehearing *En Banc* on September 15, 1992. On October 15, 1992, the Eleventh Circuit granted CSXT's Motion for a Stay of the Mandate (and thus any re-trial of the case) pending this Court's determination on CSXT's petition herein.

REASONS FOR GRANTING THE WRIT

I.
THIS COURT HAS ALREADY DETERMINED THAT THE ISSUE PRESENTED IN THIS PETITION IS WORTHY OF REVIEW IN LIGHT OF THE SIGNIFICANT SPLIT IN THE CIRCUITS ON THIS ISSUE AND ITS NATIONAL IMPORTANCE

As this Court has already implicitly noted by granting certiorari in *Easterwood*, there is a clear split of authority among the circuit courts of appeal and other lower courts with regard to the issue framed in this petition. For example, the Eleventh Circuit determined in *Easterwood* that although federal grade crossing regulations and the Manual of Uniform Traffic Control Devices ("MUTCD") address the subject matter of the responsibility and

proper methodology for selecting appropriate warning devices at grade crossings, those regulations were not, in the *Easterwood* panel's erroneous view, promulgated pursuant to the expressly pre-emptive FRSA and thus they lack pre-emptive effect. *Easterwood*, 933 F.2d at 1555-58. *See also Karl v. Burlington N. R.R. Co.*, 880 F.2d 68 (8th Cir. 1989 (addressing pre-emption only in passing and holding that common law negligence claims against railroads for allegedly inadequate traffic-control devices at crossings are not impliedly pre-empted by the FRSA).

The Tenth Circuit, on the other hand, flatly contradicted the Eleventh Circuit's interpretation in *Easterwood* and held that FRSA Section 434 expressly pre-empts any state law claim that a railroad has the duty to install additional warning devices at crossings. *Hatfield v. Burlington N. R.R. Co.*, 958 F.2d 320, 323 (10th Cir.), *petition for cert. filed*, 60 U.S.L.W. 3860 (U.S. June 8, 1992) (No. 91-1977).

The Ninth Circuit has, as described above, determined that Section 434 and federal grade crossing regulations pre-empt state law claims against railroads predicated upon negligence in selecting or providing additional warning devices at crossings so long as state or local authorities with jurisdiction over the roadway in question have evaluated the crossing and reached a decision as to the appropriate level of traffic-control protection pursuant to federal regulations. *Marshall*, 720 F.2d at 1154.[4]

Finally, the Solicitor General has argued as an amicus in *Easterwood* for yet another interpretation of the pre-emptive scope of FRSA Section 434. The Solicitor General would find pre-

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[4] *See also Smith v. Norfolk & S. Ry. Co.*, 776 F. Supp. 1335 (N.D. Ind. 1991) (finding pre-emption); *Conner v. Missouri Pac. R.R.*, No. 90-C-562-E (N.D. Okla. March 14, 1991)) (same); *Armijo v. T. & S.F. Ry Co.*, 754 F. Supp. 1526 (D.N.M. 1990); *Nixon v. Burlington N. R.R.*, No. CV85-384-BLG (1988 U.S. Dist. Lexis 16477) (D. Mont. Apr. 2, 1988) (same); *Barger v. Chesapeake Ohio Ry.*, No. 90AP-402 (Ohio App. Nov. 15, 1990) (same); *Sisk v. National R.R. Passenger Corp.*, 647 F. Supp. 861, 863 (D. Kan. 1986) ("Congress determined that grade crossing improvements [are] a governmental responsibility rather than the responsibility of the railroads . . . .").

emption only at crossings where federal funds have been expended to install warning devices. (Merits Brief of the United States as Amicus Curiae in Nos. 91-790 and 91-1206 at 26-28).

As this Court acknowledged by granting certiorari in *Easterwood*, the significant split of authority over the issue presented herein, as well as the manifest national importance of a determinative resolution of this issue, warrants the exercise of this Court's discretion in granting the petition herein to dispose of this case in a manner consistent with this Court's authoritative interpretation in *Easterwood*. Given this Court's grant of certiorari in *Easterwood*, and the Eleventh Circuit's explicit and exclusive reliance upon *Easterwood* herein, CSXT will refrain from a comprehensive presentation of arguments and authority in support of its position, but will instead refer the Court to CSXT's submissions in *Easterwood*.

Succinctly stated, the comprehensive regulatory scheme set forth in 23 C.F.R. Parts 646, 655, 924, 1204.4, and the MUTCD, "covers the subject matter of" Respondent's claim by assigning to state and local transportation authorities the responsibility to evaluate the need for, select, and pay for, traffic-control devices at grade crossings (usually with federal assistance). The railroad's duty, by contrast, involves the installation and maintenance of the warning devices chosen by state and local transportation authorities. The common law duty that Respondents seek to enforce not only relates to the subject matter of those regulations — it would assign to railroads the very same duties that federal law assigns to state and local transportation experts. Since the Secretary has clearly adopted "a rule, regulation, order or standard covering the subject matter" of Respondents' claim herein, the plain language of FRSA Section 434 pre-empts any attempt to impose this state law duty on CSXT.

II.

JUDICIAL ECONOMY, FUNDAMENTAL FAIRNESS AND THE NEED FOR CONSISTENCY SUPPORT THE GRANT OF CERTIORARI HEREIN TO DISPOSE OF THIS CASE IN ACCORD WITH THE COURT'S DETERMINATION IN *EASTERWOOD*

Because the issue framed herein is identical to the issue under consideration in *Easterwood*, this Court should grant certiorari for several reasons. First, the denial of certiorari herein could lead to the unnecessary and wasteful utilization of judicial resources for a trial on Respondents' claim if this Court later reverses or modifies the Eleventh Circuit's holding in *Easterwood*. CSXT respectfully submits that the Eleventh Circuit's stay of the mandate until this Court rules on CSXT's petition in essence invites this Court to grant certiorari herein and either (1) dispose of this case in accordance with this Court's forthcoming determination in *Easterwood*, or (2) remand the case to the Eleventh Circuit for reconsideration after this Court's renders its opinion in *Easterwood*.

Second, the grant of CSXT's petition herein would afford this Court the discretion to hear further argument on the issue presented, or to consolidate this case with *Easterwood* after the *Easterwood* oral argument in January if this Court should find that course of action appropriate. That is, this case would provide an additional set of facts and circumstances in a live controversy that would afford an additional opportunity, if necessary, for this Court to interpret FRSA pre-emption in the grade crossing context.

Finally, fundamental notions of fairness and equity support the grant of this Court's review herein. Because the three-judge panel below found itself bound by *Easterwood* and refused even to consider the correctness of the *Easterwood* panel's reasoning, the petition should be granted to ensure that this case is determined in accordance with the Court's forthcoming interpretation in *Easterwood*. If this Court is inclined to grant the petition herein, it

would of course have complete discretion to stay any further briefing or other proceedings until such time as the Court renders its decision in *Easterwood*.

CONCLUSION

For the foregoing reasons, Petitioner respectfully prays that a writ of certiorari issue to review the decision of the Eleventh Circuit as framed in this petition.

Respectfully submitted, this 11th day of December, 1992.

ALSTON & BIRD

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APPENDIX

Robert MAHONY, as father and personal representative of Eve Mahony, in his own Behalf and as next of kin and for the use and Benefit of Eve Mahony's mother, Barbara Mahony, Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, INC.,
Defendant-Appellee.

No. 90-9052.

United States Court of Appeals,
Eleventh Circuit.

July 20, 1992.

Parents of pedestrian who was struck and killed by train brought wrongful death action against railroad. The United States District Court for the Northern District of Georgia, No. 4:88-cv-13-HLM, Harold L. Murphy, J., found in favor of railroad. Parents appealed. The Court of Appeals held that: (1) parents' claim that railroad was negligent because train was allegedly traveling too fast was preempted by federal law; (2) parents could not attempt to establish railroad's liability on basis of train's alleged excessive speed; and (3) parents' theory of liability relating to inadequacy of railroad grade crossing was not preempted by federal law.

Vacated and remanded with instructions.

Birch, Circuit Judge, filed a specially concurring opinion.

Jack Harrell Senterfitt, Gerald L. Mize, Jr., and James W. Hagan, Alston & Bird, Atlanta, Ga., for defendant-appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before BIRCH, Circuit Judge, DYER, Senior Circuit Judge, and FULLAM*, Senior District Judge.

PER CURIAM:

This diversity case involves a railroad accident. On January 23, 1987, Eve Mahony was walking along a road in rural Georgia when she entered a railroad crossing and was struck by an approaching train owned by defendant CSX Transportation, Inc., ("CSX"). Mahony's parents ("plaintiffs") sued CSX for wrongful death, alleging various theories of liability. Two of these theories—that CSX was negligent in operating the train at an excessive speed and that CSX was negligent in failing to install adequate warning devices at the crossing—were dismissed by the district court prior to trial. The court reasoned that these two theories of recovery were preempted by federal law; therefore, the court ruled that evidence relating to these theories would be inadmissible at trial. The case was tried, the jury found in favor of CSX, and the plaintiffs have appealed that adverse judgment.

After the parties briefed this appeal, another panel of the Eleventh Circuit decided *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir. 1991), *cert. granted*, — U.S. —, 112 S.Ct. 3024, 120 L.Ed.2d 896 (1992). In *Easterwood*, the panel fully explained the general preemptive effect of the Federal Railroad Safety Act, 45 U.S.C. §§ 421-445 (1988) (the "FRSA"). In particular, the court discussed whether the FRSA and related federal law preempted specific state law tort claims against railroads, including claims sounding in negligence for excessive speed and inadequate warning devices. *Easterwood* has substantially clarified the law governing Mahony's case. Given the preemption principles announced in *Easterwood*, our review of this case has convinced us that several of the district court's preemption rulings, and the judgment in favor of CSX which was influenced by those rulings, are in error. Accordingly, we VACATE the judgment in favor of

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* Honorable John P. Fullam, Senior U.S. District Judge for the Eastern District of Pennsylvania, sitting by designation.

CSX and REMAND the case to the district court for further proceedings consistent with this opinion and with *Easterwood*.

[1, 2] Without intending to expand upon the meaning of *Easterwood*, we note that at least two principles announced by that panel will have application to the present case on remand. First, the plaintiffs' claim that CSX was negligent because the train was allegedly traveling too fast is preempted by federal law. As stated in *Easterwood*, a theory "that [an] accident was caused because [a] train was traveling at a negligently high rate of speed" is preempted by specific federal regulations governing the speeds at which trains can travel on particular classes of track. 933 F.2d at 1553. Because the CSX train that struck Mahony was traveling below the maximum speed allowed under federal law, the plaintiffs may not attempt to establish CSX's liability on the basis of the train's alleged excessive speed. *See id.* at 1553-54.

[3] Second, the plaintiffs' theory of liability relating to the inadequacy of the railroad grade crossing (in particular, CSX's failure to install automated warning devices at the crossing) is not preempted by federal law. The *Easterwood* panel specifically noted that although the federal government was minimally involved in regulating the construction of safer railroad grade crossings, that involvement was not so substantial or specific as to preempt state tort suits based upon a railroad's failure to maintain a safe railroad crossing. *See* 933 F.2d at 1554-55. Accordingly, in this case, the district court should not have dismissed the plaintiffs' claim that CSX negligently failed to install automated warning signals.*

We express no opinion on the merits of the numerous specific arguments pressed by the parties to this appeal. We hold only that the district court's judgment in favor of CSX cannot stand in

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* We are aware that CSX has asserted that this portion of *Easterwood* was decided without the benefit of the citation of several applicable federal authorities. Notwithstanding these additional authorities, this panel is bound by the decision in *Easterwood*. CSX's arguments suggesting that *Easterwood* was wrongly decided are more appropriately addressed in a motion to rehear the present case *en banc*.

light of *Easterwood.* Therefore, we VACATE that judgment and REMAND the case for further proceedings consistent with this opinion and *Easterwood.*

VACATED AND REMANDED WITH INSTRUCTIONS.

BIRCH, Circuit Judge, concurring specially:

I agree that we are bound by *Easterwood v. CSX Transportation, Inc.*, 933 F.2d 1548 (11th Cir.1991). I also agree that a fair reading of *Easterwood* means that the plaintiffs' excessive speed claim is preempted and that the plaintiffs' inadequate warning claim must survive. I therefore join the majority's opinion.

I write separately to note my dissatisfaction with *Easterwood.* By broadly preempting negligent speed claims and generally salvaging negligent failure to warn claims, I fear that the *Easterwood* panel may be stating the law backwards. Were I writing on a clean slate, I would recognize that, under appropriate circumstances, a plaintiff's excessive speed claim could survive, and a plaintiff's failure to warn claim might be preempted.

I.

In ruling that the speed regulations promulgated pursuant to the FRSA preempt, in a wholesale manner, any claim that a railroad company was negligent for operating its train at an excessive speed, the *Easterwood* panel fails to distinguish between the two types of negligence theories which might be brought. It seems to me that a wrongful death litigant could advance two distinct theories of a railroad's excessive speed liability. First, the plaintiff might argue that even though the train obeyed the federal speed limit, the railroad was negligent by exceeding the speed limit imposed by state law for that particular section of track. Second, the plaintiff might assert that even though the railroad obeyed the federal speed limit, the operator of the train was negligent for failing to slow down because under the circumstances, a reasonably prudent train operator would have exercised additional caution.

I believe that the first negligence theory is preempted by the FRSA, but the second is not. Preemption of the first theory simply respects the Supremacy Clause by recognizing that a railroad company should not be penalized for ignoring state operating procedures that have been intentionally trumped by specific federal legislation. Preemption of the second theory, however, goes far beyond respect for the Supremacy Clause, in that it effectively insulates a railroad from negligence liability for excessive speed as long as the railroad stays within the federal speed limits.

One hypothetical can demonstrate that this last result is unwarranted. Suppose the train that struck Mahony was traveling at 59 miles per hour, at night, in a dense fog, and during a stiff rain. If 60 miles per hour was allowed by federal law, CSX could not be sued for negligently excessive speed, even though the train's speed under these circumstances might be clearly unreasonable. To the extent that *Easterwood* prevents a plaintiff from asserting this second theory of excessive speed liability, I respectfully disagree with the opinion. Ordinarily, "[c]ompliance with a legislative enactment . . . [should] not prevent a finding of negligence where a reasonable [person] would [have taken] additional precautions." Restatement (Second) of Torts § 288C (1965).

II.

Turning to the federal preemption of tort claims based upon a railroad's failure to warn, it seems to me that the applicable federal law—the FRSA, its accompanying federal regulations, and the Manual on Uniform Traffic Control Devices for Streets and Highways—requires state and local transportation authorities to make the decisions about the warning devices needed at particular crossings. *See Hatfield v. Burlington Northern R.R.*, 958 F.2d 320, 321-24 (10th Cir.1992). When these governmental authorities have made the safety decisions about a certain crossing, it seems odd to hold a railroad responsible in common law negligence for failing to override the governmental decisions. Indeed, allowing negligence liability to be imposed upon railroads in this manner could defeat the legislature's desire for uniformity in the area of

railroad warning devices. Fearing potential liability, railroads may attempt to reach independent decisions on warning devices, notwithstanding the conclusions of those governmental agencies entrusted with the decisionmaking authority under federal law.

For this reason, I believe that a plaintiff's claim that a railroad negligently failed to install adequate warning devices can be preempted, as long as the governmental authority with jurisdiction over the applicable crossing reached a decision regarding the appropriate warning devices needed at that crossing. Under such circumstances, federal preemption is sensible because it seems unfair to hold a railroad accountable for the warning decisions made by other entities. In reaching this conclusion, I appear to be supported not only by the decision of the Tenth Circuit in *Hatfield*, but also by then Judge Kennedy's opinion in *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir.1983). *See id.*, at 1154 (suggesting that federal preemption attaches when "a federal decision is reached through the local agency on the adequacy of the warning devices at the crossing").

III.

In sum, the fairest reading of *Easterwood* indicates that the FRSA preempts a plaintiff's excessive speed claim but not a plaintiff's failure to warn claim. I agree that we are bound by *Easterwood*, even though reasonable arguments can be made that would limit *Easterwood's* applicability to the present case. Therefore, I join the majority's opinion. However, the reservations I have outlined above are substantial, perhaps significant enough to justify a rehearing *en banc*.

THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
No. 90-9052

ROBERT MAHONY, as father and personal representative of Eve Mahony, in his own behalf and as next of kin and for the use and benefit of Eve Mahony's mother, BARBARA MAHONY,

Plaintiffs-Appellants,

v.

CSX TRANSPORTATION, INC.,

Defendant-Appellee.

U.S COURT OF APPEALS
ELEVENTH CIRCUIT
FILED
SEP 15 1992
MIGUEL J. CORTEZ
CLERK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

(Opinion July 20, 11th Cir., 1992, F. 2d).

Before: BIRCH, Circuit Judge, DYER, Senior Circuit Judge, and FULLMAN*, Senior district Judge.

PER CURIAM:

☒ The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

☐ The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

☐ A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

s/ Stanley F. Birch, Jr.
UNITED STATES CIRCUIT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ROBERT MAHONY, as father and personal representative of Eve Mahony, in his own behalf and as next of kin and for the use and benefit of Eve Mahony's mother, BARBARA MAHONY,	)	
Plaintiffs,	)	
v.	)	CIVIL ACTION 4:88-cv-13-HLM
CSX TRANSPORTATION, INC.,	)	
Defendant.	)	

ORDER

Eve Mahony, Plaintiffs' decedent, was struck and killed by a CSX train as she walked across a grade crossing. CSX moves for partial summary judgment on the following grounds: that Plaintiffs' common law claims for negligence based on the inadequacy of warning devices at the grade crossing in question, the speed of the train at the time, and the need for a pedestrian overpass or underpass, are all preempted by federal law. CSX argues further that Plaintiffs' evidence of negligence based on the lack of a pedestrian underpass or overpass is insufficient as a matter of law to submit to a jury. For the following reasons, CSX's motion will be granted in part and denied in part.

The Preemption Doctrine

In 1973, the predecessor of the Eleventh Circuit determined that, by enacting the Federal Railroad Safety Act, 45 U.S.C. § 421 *et seq.*, Congress intended "to establish nationally uniform railroad safety," and allowed a "narrow spectrum of deviation from national uniformity" by permitting state regulation under two circumstances only. *Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108, 1112 (5th Cir.), *cert. denied*, 414 U.S. 855 (1973). First, a state may regulate railroad safety until the Secretary of Transportation has adopted a "rule, regulation, order or standard covering the subject matter." § 434. Second, a state may regulate if the local measure is necessary to eliminate or reduce a local hazard, is not incompatible with federal law, and does not unduly burden interstate commerce. *Id.* Further, as this Court has noted previously, in the preemption context, state regulation includes both legislative enactments and common law theories of recovery. *Edmondson v. International Playtex, Inc.* 678 F. Supp. 1571, 1573 (N.D. Ga. 1987), *citing San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) and *Tectonics, Inc. of Florida v. Castle Construction Co.*, 753 F.2d 957 (11th Cir. 1985)[, *cert. denied*, 474 U.S. 848 (1985)].

A. **Warning Devices**

CSX argues that the "subject matter" of the need for warning devices at the crossing in question has been addressed by the Georgia Department of Transportation (DOT) and, under federal law, the state's determination becomes a federal decision, thereby preempting Plaintiffs' common law theory of negligence on this issue.

The federal Secretary of Transportation has approved the Manual on Uniform Traffic Control Devices for Streets and Highways (commonly known as MUTCD) as "the national standard for all traffic control devices." 23 C.F.R. § 655.603(a). Under the MUTCD, "[t]he selection of traffic control devices at grade crossings and the approval for federal funds is to be made by public

agencies having jurisdiction over the crossing. *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983). The Secretary, therefore, "has delegated federal authority to regulate grade crossings to local agencies," *Id.* In *Marshall*, the Ninth Circuit ruled that because the locality in charge of the crossing had not made a determination concerning the selection of a warning device, a "federal decision" had not been made, and state common law negligence claims were not preempted. *Id.*

In *Nixon v. Burlington Northern Railroad*, Case No. CV 85-384-BLG-JFB (D. Mont. Apr. 2, 1988) (unpublished order), the district court applied *Marshall* to slightly different facts. In *Nixon*,

> an agreement was made between the State of Montana, acting through its Department of Highways, Fallon County, and defendant Burlington Northern, wherein the parties agreed to install flashing light signals with automatic gates at the crossing. . . . This agreement was the result of an evaluation and determination by the State Department of Highways as to the type of crossing protection warranted, and was subsequently approved by the Federal Highway Administration.

Based on those facts, the Court concluded as follows:

> The determination by the State Highway Department constituted a federal decision, reached through the state agency, on the adequacy of the warning devices at the crossing. Once that determination was made, any applicable state common law or statutory duty upon defendant became void, as federally preempted.

The instant case differs factually from *Marshall* and *Nixon*. In *Marshall*, there was no preemption because there clearly had been no "federal decision" regarding warning devices at the grade crossing. In *Nixon*, the preemption doctrine applied because the state's evaluation of the need for a device had been clearly adopted by the Federal Highway Administration. In the instant case, Hester's first affidavit, submitted by CSX, indicates that the Georgia Department of Transportation studied the grade crossing

in question and "recommended that automatic gates and lights not be installed at this crossing." In an affidavit submitted by Plaintiffs, Hester stated that the DOT engineer "recommended" that automatic gates with flashing lights be installed.[1]

In Hester's second affidavit submitted by CSX, he stated that

> [a]fter our 1985 evaluation of the crossing . . . the Railroad-Highway Grade Crossing Section [of the DOT] made a decision not to install automatic warning devices.

The inconsistencies in Hester's affidavits as to whether the DOT made a recommendation or a decision is critical to the preemption

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[1] Plaintiffs have moved to strike CSX's summary judgment motion on the ground that Hester's affidavit is the basis for the motion and the affidavit is inadmissable under 23 U.S.C. § 409. Section 409 reads as follows:

> Notwithstanding any other provision of law, reports, surveys, schedules, lists or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of . . . railway-highway crossings, pursuant to sections 130, 144 or 152 of this title . . . shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data.

Defendant responds that Plaintiffs have waived the inadmissibility of the affidavit by submitting one of their own that refers to the report. Defendant further asserts that Plaintiffs have admitted the contents of the report in their statement of facts.

The Court finds that Plaintiffs have not waived the inadmissibility issue because, in their brief, they argue that "*if* the report is to be considered, it contains findings beneficial to Plaintiffs." (emphasis added). In any event, the Court denies Plaintiffs' motion. At first glance, the section does appear to bar the use of Hester's affidavit because the DOT evaluated the grade crossing to determine the need for warning devices. The Court has not found any case law or legislative history expounding on the intent of this statue. The Court finds that, to encourage states to comply with safety standards, Congress intended to bar litigants from using the state's reports as evidence of a party's negligence. In the instant context, evidence of the existence of the valuations is needed to determine whether or not the subject matter has been preempted. Section 409, therefore, does not bar the Court's consideration of the content of Hester's affidavits.

issue. On one hand, a "recommendation" concerning warning devices would not be tantamount to a "rule, regulation, order or standard," within the meaning of § 434, which would then be adopted by the Secretary, under 23 C.F.R. § 655.603(a), which would thereby preempt Plaintiffs' claim for common law negligence based on the lack of additional warning devices. On the other hand, *a "decision" by the DOT would be such a "rule*, regulation, order or standard," *and would bar Plaintiffs' state law claim* based on the need for warning devices.

On the record *as it is presently constituted*, there is no clear indication that the State of Georgia has made a conclusive determination of the need for warning devices at the crossing in question. The Court therefore finds *insufficient evidence* that the subject matter has been preempted as a matter of law.

Defendants argue that even if the subject matter has not been preempted, Georgia law prevents CSX from erecting warning devices. In support, CSX cites O.C.G.A. §§ 32-6-200, 48-8-194, 32-6-290, 32-6-50(c), which provide that the state can require CSX to install devices. CSX argues further that O.C.G.A. §§ 46-6-25 and 36-2-51 would prohibit it from installing a traffic device on a road.

The Georgia Court of Appeals was recently faced with a similar situation in *Southern Railway Co. v. Georgia Kraft Co.*, 188 Ga. App. 623 (Ga. Ct. App. 1988). At trial, the court had charged the jury that they should determine whether the railroad "was negligent in failing to employ additional precautions at the crossing where the collision occurred." The jury returned a verdict against the railroad. On appeal, the railroad argued that the charge was incorrect "because it is the Georgia Department of Transportation which decides which warnings are to be used at particular crossings." The Georgia Court of Appeals rejected the railroad's argument by quoting the following passage from *Wright v. Dilbeck*, 122 Ga. App. 214 (Ga. Ct. App. 1970): "an act or omission may amount to negligence under the particular facts and circumstances, although there is no statute so declaring."

This Court is bound by a state court's determination of state law. Under the authority of *Southern Railway*, therefore, CSX's argument that it lacked authority under Georgia law to erect additional warning devices is rejected.

B. **Speed**

CSX argues additionally that Plaintiffs' claim for negligence based on the rate of speed of the train at the time of the incident is similarly preempted by federal law. Federal regulations determine the speed limit for trains, and specify variances based on such factors as curvature and elevation of the track. *See* § 213.57. State common law negligence claims to determine a reasonable rate of speed, therefore, are preempted. *See* 45 U.S.C. § 434; *Sisk v. National Railroad Co.*, 647 F. Supp. 861, 865 (D. Kan. 1986).

CSX maintains that the regulations permitted its train to be travelling through the intersection at 60 miles per hour, and that the undisputed evidence is that the train was travelling at 35 miles per hour. In their supplemental response, Plaintiffs allege that the track at the grade crossing was curved and, presumably therefore, a jury issue exists as to the train's compliance with the speed limit.

The Court disagrees. As the party with the burden at trial, Plaintiffs must show the absence of a genuine triable issue to avoid a summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Although the exhibits to Dr. Snyder's deposition show a curve in the track before the grade crossing, the record does not contain evidence, such as the degree of the curve, which would permit a rational jury to conclude that the train was exceeding the limits set by federal law. CSX's motion for summary judgment on the ground that the train was being operated at a negligent speed is due to be granted.

C. **Pedestrian Underpass or Overpass**

CSX moves for summary judgment on the additional ground that federal law regulates the need for pedestrian walkways and therefore Plaintiffs' claim for negligence on the lack of an underpass or overpass is preempted. The Court agrees because federal regulations provide that the federal government should study the

"relative hazard of public railroad-highway grade crossings," and plan a safety improvement project. *See* 23 C.F.R. § 924.9(a)(4)(iii), (b).

Conclusion

In conclusion, Plaintiffs' common law tort claims based on the speed of the CSX train on the lack of an adequate pedestrian walkway are preempted by federal law. On the evidence presented, however, Plaintiffs state law claim based on an inadequate warning device at the grade crossing is not preempted by federal regulation.

ACCORDINGLY, Plaintiffs' motion to strike Defendant's motion for summary judgment is DENIED; Defendant's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART.

IT IS SO ORDERED, this the 6th day of February, 1990.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

ROBERT MAHONY, as father and personal representative of Eve Mahony, in his own behalf and as next of kin and for the use and benefit of Eve Mahony's mother, Barbara Mahony,	)	
Plaintiff,	)	CIVIL ACTION 4:88-cv-13-HLM
v.	)	
CSX TRANSPORTATION, INC.	)	
Defendant.	)	

ORDER

Both sides have moved the Court to reconsider portions of the summary judgment order decided February 6, 1990. CSX challenges this Court's determination that the evidence does not show a "federal decision" with regard to warning devices such that state law claims would be preempted by federal law, and Plaintiff challenges this Court's determination that a jury issue does not exist with regard to the proper speed of the train.

Speed

In the summary judgment order, the Court found that

> the regulations permitted its train to be travelling through the intersection at 60 miles per hour, and that the undisputed evidence is that the train was travelling at 35 miles per hour.

In his motion to reconsider, Plaintiff contends that CSX is obligated to travel at a "reasonable" speed regardless of the speed limit, and that there is a question of fact concerning the applicable speed limit.

As the Court made clear in its prior order, the "reasonableness" of the train's speed under Georgia law is preempted by the speed set by federal regulation. Federal law *alone* determines the "reasonable" rate of speed, even if a factual dispute exists concerning the proper speed limit.

The sole issue is whether the speed was within the limits set by those regulations. The parties do not dispute that the train was traveling at a speed of 35 miles per hour when Plaintiff's decedent was killed. What is disputed is the applicable speed limit for this particular grade crossing.

Plaintiff contends that his only burden on the speed limit issue is "to show some question of fact, or that the movant is incorrect as to the law alleged." Plaintiff interprets his burden too lightly. The Supreme Court has made clear that the nonmovant "must do more than simply show that there is some metaphysical doubt about material facts . . . . [T]he nonmoving party must come forward with 'specific facts showing that there is a genuine issue for trial.' " *Matsushita Elec. Ind. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (footnote, citations, and emphasis omitted). In the instant case, therefore, Plaintiff must point to evidence showing that the train was exceeding the speed limit allowed by federal law.

Defendant claims that the track is "Class 4," which permits speeds up to 60 miles per hour. 49 C.F.R. § 213.9; *see* DeLong Aff. ¶ 4. Plaintiff has shown evidence that the track is "Class 3" due to curvature, which permits speeds up to 40 miles per hour. § 213.9; *see* Abercrombie Dep. at 37. Plaintiff shows further that the curve has been measured at 6 degrees. *See* Purvis Dep., Exh. A. The evidence of curvature, standing alone, is insufficient to show that the speed limit is below 35 miles per hour because Plaintiff has not pointed to evidence of the elevation of the outer rail. *See* 49 C.F.R. § 213, Appendix A (train speed limit is measured by the *combination* of degree of the curve and the elevation of the outer rail).

Plaintiff cites further to ¶ 11 of Hester's affidavit, submitted with Plaintiff's opposition to CSX's motion for summary judgment, which reads as follows:

> Our report listed a speed limit for trains of 20mph. This information was obtained from the U.S. Department of Transportation Crossing Inventory, which is maintained as a part of my file. The information is provided to the U.S. Department of Transportation by the Railroad which sets its own timetable speeds.

The report, attached to CSX's motion to reconsider, does not state that 20 miles per hour is the speed limit; rather, it states that 30 trains crossed the intersection at a rate of 20 miles per hour. In a deposition of Plaintiff's expert Massie, however, Massie reviewed the inconsistency in the report and stated that "from his research in the area," he understands that "the maximum allowable train speed over a crossing is given by that train speed."

The Court finds the evidence conflicting such that summary judgment cannot be entered as to the train's compliance with the federal speed limit. Although the Plaintiff has the burden of proof, there is some evidence from which a jury could find that the speed limit is 20 miles per hour and therefore that the train was speeding when its crossed the intersection at 35 miles per hour. CSX is, however, still entitled to judgment on the preemption issue: *no* evidence or argument based on Georgia law concerning the train's speed will be admissible at trial.

Warning Devices

CSX moves the Court to reconsider that portion of its summary judgment order that found the evidence inconclusive on preemption of the warning devices issue. Specifically, the Court found that

> the inconsistencies in Hester's affidavits as to whether the DOT made a recommendation or a decision is critical to the preemption issue. On one hand, a "recommendation" concerning warning devices would not be tantamount to a "rule, regulation, order or standard," within the meaning of § 434,

> which would then be adopted by the Secretary, under 23 C.F.R. § 655.603(a), which would thereby preempt Plaintiffs' claim for common law negligence based on the lack of additional warning devices. On the other hand, a "decision" by the DOT would be such a "rule, regulation, order or standard," and would bar Plaintiffs' state law claim based on the need for warning devices.

The Court continued:

> on the record as it is presently constituted, there is no clear indication that the State of Georgia has made a conclusive determination of the need for warning devices at the crossing in question. The Court therefore finds insufficient evidence that the subject matter has been preempted as a matter of law.

Pursuant to footnote 1 of the Court's prior order finding the DOT report itself to be admissible for the limited purpose of determining preemption, CSX has submitted a copy of the report. In pertinent part, the report reads as follows:

> RECOMMENDATIONS, SUBJECT TO STATE-WIDE PRIORITY RANKING AND AVAILABILITY OF FUNDS, ARE AS FOLLOWS:
>
> It is recommended that the crossing not be signalized at this time due to low ADT.
>
> NE & SW Quadrants: Install automatic gates with flashing lights. Locate 15 ft. from track centerline (perpendicular) and 8 ft. from the pavement edge.
>
> Required: Centerline, Symbolized pavement markers, and advance warning signs.

The report then recites that it is recommended by Wendell Hester and approved by Archie C. Burnham, Jr.

Although the report lists apparent inconsistent recommendations such that it is not clear which recommendation was approved, the preemption issue is not whether or not the federal

government, through the state, has determined that warning devices are needed — the issue is whether a decision was made. The record does not explain what position Burnham holds or what his "approval" meant. For example, if he is Hester's supervisor, his approval could be of Hester's decision concerning the proper recommendation. Alternatively, his "approval" could be an acceptance by the state of the recommendation.

However, Hester's affidavit, submitted by Defendant in its reply brief, recites that after the recommendations were made, "the Railroad Highway-Grade Crossing Section [of the DOT] made a decision not to install automatic warning devices." This statement, read along with the actual report, reveals that a decision was made.

Plaintiff asks this court for leave to depose Hester and Burnham should this Court find that reconsideration of the warning devices preemption issue is appropriate. The Court does not find that such further discovery is needed — regardless of the basis for their decisions, the only significant fact for purposes of the preemption issue is that a decision was made.[1]

In sum, the undisputed evidence shows that a decision was made by the State which, under the law, is a "federal decision" that preempts Georgia law on the adequacy of the warning devices. CSX is therefore entitled to summary judgment on that issue such that no evidence or argument on the adequacy of the warning devices based on Georgia law will be admissible at trial.

ACCORDINGLY, Plaintiff's motion for reconsideration is GRANTED IN PART and DENIED IN PART; Defendant's motion for reconsideration is GRANTED.

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[1] If Plaintiff believes that the testimonies of Hester and Burnham may be relevant for another purpose, they may depose those individuals by agreement with counsel for CSX or by leave of Court upon proper motion.

IT IS SO ORDERED, this the 16th day of April, 1990.

s/ Harold L. Murphy
UNITED STATES DISTRICT JUDGE